NO. 86-6 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAMES G. RICKETTS,

Petitioner,[1]

-vs-

JOHN HARVEY ADAMSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. This case was originally docketed in July under the title Arizona v. Adamson.

16pgs

Question Presented

Does waiver of double jeopardy protection require that the phrase "double jeopardy" be inserted into a plea agreement when it is clear, from the terms of the agreement, and the trial court's explanation to a defendant assisted by three attorneys, that, if he breached the agreement, the state may prosecute him for first-degree murder, and is the state court's interpretation of the terms of that agreement, and the rights forfeited under it, a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d)?

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THE MAJORITY OPINION REFUSES TO RECOGNIZE THAT THE INTERPRETATION OF A STATE PLEA AGREEMENT BY THE ARIZONA SUPREME COURT IS A FACTUAL DETERMINATION ENTITLED TO THE PRESUMPTION OF CORRECTNESS, BUT THE NINTH CIRCUIT GAVE IT THAT PRESUMPTION IN 1981.

Petitioner has pointed out that the key to this case -- the interpretation of the plea agreement, and John Harvey Adamson's deliberate breach of it -- was decided as a factual matter by the Arizona Supreme Court, in Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932 (1980). In 1981, a three-judge panel of the Ninth Circuit, looking at the same agreement, said:

> We find that Adamson was given a full and fair hearing of his claims in state court and that the statutory presumption of correctness attaches to its findings of fact.
>
> Adamson cannot refute that presumption, although he argues that the Arizona Supreme Court erred on the merits in interpreting the plea agreement. The interpretation reached by both the state court and the federal

> district court, that the plea agreement did not contemplate renegotiation in the event of a retrial, is eminently reasonable.

Adamson v. Hill, Memorandum No. 80-5941, at 5, (9th Cir., Nov. 30, 1981) (footnote omitted) (pg. C-10 in the appendix to the petition). It could not be plainer that the Ninth Circuit in 1981 treated the interpretation of Adamson's obligations under the agreement, and his waiver of rights, as a factual determination by the Arizona Supreme Court, and accorded that court's findings a presumption of correctness. This Court denied certiorari. Adamson v. Hill, 455 U.S. 992 (1982).

When this Court looks at the majority opinion in the instant case, it will find not one word about the Arizona Supreme Court's interpretation of the agreement being a purely factual determination, and will certainly find no deference in the

form of a presumption of correctness.

Judge Kennedy, writing separately as one of four dissenters to emphasize the extent of his disagreement with the majority's analysis, said:

> Prosecutors do not have to explain the mysteries of double jeopardy before entering into an enforceable plea agreement. The whole purpose of such agreements, as in this case, is to permit the defendant to plead to lesser charges subject to the risk of facing more serious ones if he does not keep his end of the deal. For the court, deus ex machina, to drop the idea of double jeopardy and waiver into the plea bargain context is inconsistent with any reasonable interpretation of the contract made between the defendant and the state. The contract makes no sense if by some legal theory it is contended defendant did not accept it with full knowledge and understanding of its enforcement terms. The defendant well knew that he could not be required to accept the enforcement terms of the plea agreement, and in this context the failure to advise him of his double jeopardy rights is quite beside the point. Indeed, if the phrase "double jeopardy" had been added to the litany of rights the defendant was asked to waive in the plea agreement, competent defense counsel most surely would have

objected to it. For in truth the defendant was not waiving double jeopardy. Its protections would not apply in the event of the breach; and if the second degree conviction remained in force, the defendant was entitled to the protections of the double jeopardy clause . . . .

. . . .

The critical issue in the case becomes whether the defendant's acts were in breach of the agreement. That issue is one of state law, nothing more. Its outcome depends on primary and historical facts, which we have no authority to determine. See Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980). Even if we did have authority to scan the state's finding that there was a breach of the agreement, there is ample support for it.

. . . .

In the context of the plea bargain before us, the double jeopardy analysis of the court is artificial. It gives the defendant a windfall of the kind that results when a court imposes a constitutional interpretation of new dimensions in what should have been a simple case of the making of a bargain and the failure to keep it. I dissent.

Adamson v. Ricketts, 789 F.2d 722, 749-50 (9th Cir. 1986) (emphasis supplied).

In order to ignore the Arizona Supreme Court's interpretation of the plea agreement, the majority imposed the artificial requirement of "waiver" of double jeopardy, in express terms, upon the plea agreement. By so doing, it proceeded to the conclusion that that converted the issue into a mixed question of law and fact, and further limited the meaning of "historical facts" to mechanical matters such as whether Adamson signed the plea agreement. 789 F.2d at 727-28 n.5. The majority erred further by saying that whether Adamson's actions constituted a waiver of a constitutional right was a question of federal law. Id. The overriding question was what Adamson gave up under the provisions of the plea agreement in the event he breached. The second factual question was whether his actions constituted a breach. The Arizona

Supreme Court decided both of these adversely to him in 1980 and the Ninth Circuit agreed in 1981. The majority opinion thus ignores the law of the case for 5 years, and recasts the question from 1981 to 1986 into a mixed one of law and fact. There was no other way for the majority to reach the result it did.

We have five Arizona Supreme Court justices in 1980 making factual findings that Adamson gave up certain protection under the language of the plea agreement in case he breached it, and a further finding that he breached it. We have a district judge and three judges of the Ninth Circuit in 1981, and four more in 1986, agreeing that those determinations are matters of state law and factual findings due a presumption of correctness. Juxtaposed to that are the seven members of the majority in 1986 saying these are mixed questions of law

and fact, and ignoring the factual conclusions of the Arizona Supreme Court. In toto, we have 13 judges on one side and 7 on the other. One of these groups is wrong in its approach to this case, and wrong about whether the record sustains the factual conclusions of the Arizona Supreme Court. Petitioner respectfully submits that the Ninth Circuit applied the proper standard of review in 1981. The majority in 1986 has violated, not only its own law of the case ruling, but Sumner v. Mata, 449 U.S. 539 (1981), 28 U.S.C. § 2254(d), and has created a new constitutional requirement of express waiver of a right in a context where neither this Court, nor the Ninth Circuit, has ever held it must be expressly waived by inserting the legal term of art "double jeopardy" into a plea agreement.

John Harvey Adamson, assisted by three attorneys before he entered into the plea agreement, knew what it said, and what the consequences were if he breached it. Anyone who reads the plea agreement as what it is, a contract, will come to that conclusion. Having the state momentarily at a disadvantage after the Arizona Supreme Court reversed the Dunlap and Robison convictions, he sought to capitalize on that by making new "non-negotiable" demands. In 1981 the Ninth Circuit, rejecting his double jeopardy argument, said:

> In anticipation that this appeal would fail, Adamson suggests that this court allow him to "cure" his breach of the plea agreement by returning him to the status quo prior to his refusal to testify. Compliance with his request would reduce the meaning of the various state and federal decisions in this case to the status of advisory opinions and render meaningless the trial resulting in his murder conviction. In his written refusal to testify and list of demands, Adamson

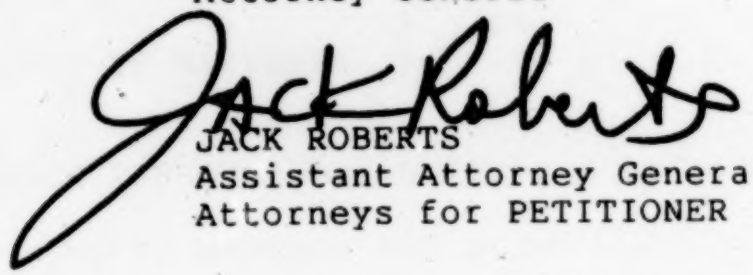
> acknowledged that he ran the risk of reprosecution for first degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble.
>
> AFFIRMED.

Adamson v. Hill, supra, at 5-6. (Pgs. C-11 and 12 in appendices to the petition.)

Having decided the case correctly in 1981, a majority of the Ninth Circuit in 1986, in effect, has rewarded Adamson's open defiance and attempt to extract new concessions from the state by leaving this admitted hired killer with the benefit of a bargain he breached, and nullifying the prosecution's right, specifically reserved under the plea agreement, to try him for first-degree murder. This Court should not leave that offensive result undisturbed.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



JACK ROBERTS
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Attorneys for PETITIONER

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he is a member in good standing of the United States Supreme Court Bar.

That on the 19th day of September, 1986, he deposited in a United States Post Office with first-class postage prepaid forty (40) copies of the REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, in James G. Ricketts v. John Harvey Adamson, No. 86-6, addressed to:

The Honorable Joseph Spaniol, Jr.
United States Supreme Court
Office of the Clerk
Washington, D.C. 20543

and caused to be deposited three (3) copies addressed to:

TIMOTHY K. FORD
600 Pioneer Building
Seattle, Washington 98104
Attorney for JOHN HARVEY ADAMSON

Solicitor General
Department of Justice
Washington, D.C. 20530

That to his knowledge the mailing of the petition took place on September 19, 1986.

JACK ROBERTS
Assistant Attorney General

SUBSCRIBED AND SWORN to before me this 19th day of September, 1986.

CHRIS L. PISKE
NOTARY PUBLIC

My Commission Expires:

October 28, 1989

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